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No. 95-203

Supreme Court, U.S.
FILED
AUG 30 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MEMPHIS; DR. W.W. HERENTON, Mayor;
MELVIN BURGESS, Director of Police Services,

Petitioners,

vs.

EAST BROOKS BOOKS, INC.,
d/b/a Getwell Bookmart and Airport Adult Theater, STEVE COOPER,
SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC.,
d/b/a Club Tiffany,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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36 pp

QUESTIONS PRESENTED

I. Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the Fourth and Sixth Circuits).

II. Whether disclosure of certain information by all shareholders in corporate adult businesses violates the First Amendment.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition of the Case Below	2
B. Facts	4
REASONS FOR DENYING THE WRIT	7
1. THE SIXTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT	7
2. THERE IS NO IMPORTANT QUESTION RAISED IN THIS CAUSE REQUIRING REVIEW BY THIS COURT OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS	8
3. THERE IS NO CONFLICT IN THE CIRCUITS REQUIRING REVIEW	9
4. ADMINISTRATIVE DELAY INVALIDATES ORDINANCE	14
5. COMMON LAW CERTIORARI IS NEITHER PROMPT NOR MEANINGFUL JUDICIAL REVIEW, NOR GUARANTEED ACCESS TO THE COURTS	15

6. THE PETITION HAS NUMEROUS MISSTATEMENTS OF LAW AND FACT 17

7. REQUIRING ALL SHAREHOLDERS TO PROVIDE DISCLOSURE AND OBTAIN LICENSE FOR CORPORATE ADULT BUSINESS VIOLATES FIRST AMENDMENT 20

CONCLUSION 23

APPENDIX A A-1

TABLE OF AUTHORITIES

Page(s)

CASES:

11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland, 58 F.3d 988 (4th Cir. 1995) 10,13

Acorn Investments, Inc. v. City of Seattle, 887 F.2d 219 (9th Cir. 1989) 20

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971) 8

Boyce v. Williams, 215 Tenn. 707, 389 S.W.2d 272 (1965) 15

Chesapeake B & M, Inc. v. Harford County Maryland, 58 F.3d 1005 (4th Cir. 1995) 13

City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988) 18

Clark v. Metro Government of Nashville, 827 S.W.2d 312 (1992) 15

Cooper v. Williamson County Board of Educ., 746 S.W.2d 176 (Tenn. 1987) 16

Dumus v. City of Dallas, 648 F.Supp. 1078 (N.D. Tex. 1986) 21

Ellwest Stereo Theater, Inc. v. Boner, 718 F. Supp. 1553 (M.D. Tenn. 1989) 21

Fairhaven Corp. v. Tenn. Health Facilities Comm'n, 566 S.W.2d 885 (1976) 16

Fentress County Beer Board v. Cravens, 356 S.W.2d 260 (Tenn. 1962) 16

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965) 7,8,10,14,19

FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988) 21

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596 (1990) 7,8,9,11,12,13

Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) 20

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) 10,11

Grand Brittain, Inc. v. City of Amarillo, Texas, 27 F.3d 1068 (5th Cir. 1994) 12

Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981) 10

Hewgley v. Trice, 207 Tenn. 466, 340 S.W.2d 918 (1960) 15

Hoover Motor Express Co. v. R. R. and Public Util. Comm'n, 195 Tenn. 593, 261 S.W.2d 233 (1953) 16

Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) 9

Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325 (1957) 19

Louisville and N.R.R. v. Public Service Comm'n, 631 F.2d 436 (6th Cir. 1980) 17

McIntyre v. Ohio Elections Comm'n, ____ U.S. ____, 115 S. Ct. 1511 (1995) 21

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) 21

Natco Theaters, Inc. v. Ratner, 463 F. Supp. 1124 (S.D.N.Y. 1979) 21

National Socialist Party v. Village of Skokie, 432 U.S. 43,97 S.Ct. 2205 (1977) 12

Penco, Inc. v. Moody, 474 F. Supp. 1001 (S.D. Ohio 1978) 21

Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1697 11

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 89 S.Ct. 935 (1969) 19

Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239 (1975) 8

State, ex rel. Karr v. Taxing Dist. of Shelby Co., 84 Tenn. 240 (1886) 15

T.K.'s Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994) 11,12,21

Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960) 21

Teitel Film Corp. v. Cusack, 390 U.S. 139, 88 S. Ct. 754 (1968) 8

Tennessee Cent. R.R., Co. v. Campbell, 75 S.W. 1012 (Tenn. 1902) 18

United States v. Thirty-Seven Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971) 8

Uselton v. Price, 41 Tenn. App. 134, 292 S.W.2d 788 (1953) 15

Watkins v. Naifeh, 635 S.W.2d 104 (1982) 17

STATUTES:

T.C.A. § 4-5-101 19

T.C.A. § 27-9-106 16,17

T.C.A. § 29-9-101 16

T.C.A. § 39-17-905 19

T.C.A. §27-8-112 17

Tennessee Rule of Appellate Procedure 10 18

MISCELLANEOUS:

City of Memphis Ordinance 4013, § 122(a)(5)(7) 20

McQuillin Municipal Corporation § 10.09, 3d ed. 18

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RESPONDENTS' BRIEF IN OPPOSITION

The Petition correctly sets forth the opinions below and the jurisdiction.

In addition to the constitutional and statutory provisions cited by the Petitioners, the Respondents[1] attach as Appendix A, the statutory provisions for common law and statutory certiorari. The same procedural framework applies to both writs, but so

[1] There are no parent or subsidiary corporations to be listed.

much of the statutes as prescribed a de novo hearing apply exclusively to the statutory writ of certiorari. Common law writ of certiorari review is limited as discussed hereafter. Also in Appendix A is Rule 10 of the Tennessee Rules of Appellate Procedure by which the writ system was abandoned for interlocutory appeals.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The City of Memphis ("the City") originally enacted Ordinance 3988 in October 1990 which imposed a licensing and zoning scheme on all sexually oriented businesses in the City. Plaintiffs filed suit challenging the constitutionality of the licensing and zoning provisions and sought a preliminary injunction which was granted on December 28, 1990. The City passed on January 15, 1991 Ordinance 4013 ("the Ordinance") which superseded the prior Ordinance and contained substantially the same provisions.

Plaintiffs filed in June 1991 a Motion for Partial Summary Judgment relating to the zoning portion of the Ordinance which had required all existing nonconforming uses be terminated at the end of one (1) year. The Court subsequently granted this Motion in August 1992, declaring the amortization provision invalid and in violation of the charter of the City of Memphis and the statutes of the State of Tennessee. This action was subsequently the source of a cross-appeal by the City and affirmed by the Court of Appeals. No further review on zoning is sought by the Petitioners in this cause. In 1992, cross-motions for summary judgment on the licensing provisions of the Ordinance were filed. Two Plaintiffs who were employees of East Brooks Books were dismissed in December 1992 for mootness, in that more than two (2) years had passed since their obscenity convic-

tions which were grounds for disqualification of employment and also grounds for revocation of the employer's license under the Ordinance.

The District Court on May 14, 1993 granted the Summary Judgment Motion of the City, except to the license fee which was later settled.

While the District Court had determined that the Respondents lacked standing to challenge any of the disabling factors for suspension or revocation and lacked standing to challenge prior convictions as a ground for denial of a license, the District Court upheld the disabling factors other than criminal convictions for license issuance. The Sixth Circuit affirmed the lack of standing and vacated that portion of the District Court's opinion which ruled on the disabling factors which had the effect of depriving the District Court's opinion of any precedential effect, so that none of the District Court's findings would be res judicata or collateral estoppel.

The Ordinance requirement that each person with any ownership interest sign the application and meet all license qualifications was found impermissibly broad. Additionally, the Court of Appeals held the denial of a license because the applicant had demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law abiding manner, thus necessitating action by a law officer was invalid both as for the license approval and for license suspension. Such challenge was permitted under the overbreadth doctrine by the Court of Appeals.

Finally, the Court of Appeals determined there would be a three (3) to five (5) month wait for administrative hearing and judicial review which did not meet this Court's provision for prompt judicial review. The licensing scheme failed to provide sufficient procedural safeguards and was unconstitutional.

B. Facts

The facts in the record submitted for the determination of the cross-motions for summary judgment are not pertinent. However, the provisions of the Ordinance of the City and the statutory provisions outlining the procedure for common law certiorari are pertinent. The time periods are summarized.

Sections 20-122(b) and 20-124 of the Ordinance are applicable to the administrative hearings, and the statutory procedures are set out in Title 27, Chapter 9 of the Tennessee Code Annotated. (Appendix A).

A new applicant for a license must file with the Director of Police who shall approve the issuance within thirty (30) days after receipt of the application. Applications for a corporation must be filed in the name of all shareholders regardless of ownership and each shareholder must qualify.

If the Director denies issuance of a license, written notice is sent by certified mail or delivered by process server. Appeal of denial must be within ten (10) calendar days after receipt of notice. A hearing must be scheduled on the denial of a license within sixty (60) days. A decision by the Director of Police must be made within five (5) days of the conclusion of the hearing. Any appeal must be made by common law writ of certiorari to a Court of competent jurisdiction. Since a new applicant has no license, no temporary license for operation may be issued during the administrative process or during the pending judicial proceedings.

While the new applicant must appeal within ten (10) days from the decision of the Director of Police, none of this time, nor of any other times applicable for action by the applicant is counted in the computation of the time to apply for, appeal or request judicial review of a license denial.

Upon the filing of the petition for certiorari, the Clerk of the Court shall immediately send by registered return-receipt mail to the board or commission a notice of the filing and a certified copy of the petition. T.C.A. §27-9-107.

The granting of the common law writ of certiorari is discretionary. T.C.A. §27-9-101.

The Board or Commission shall cause to be made, certified and forwarded to the Court a transcript of the proceedings before the Director of Police services. No time limit is provided. T.C.A. §27-9-109.

At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial at the earliest practical date. T.C.A. §27-9-111. While the Court of Appeals indicated a minimum wait from three (3) to five (5) months for judicial review, the time would be even longer since it excluded any period of time to file the transcript which is not specified, or for the applicant for a license to act. Most importantly, the Court of Appeals left out the original thirty (30) day period for the Director of Police to decide a license before any appeal of his decision.

The summary of the time periods would be thirty (30) days for the original review of a license, the time for receipt of written notice of denial by certified mail or delivery by a process server, a potential sixty (60) days delay before a hearing of the appeal before the Director of Police, five (5) days for rendering a decision after conclusion of hearing. Eliminated is any time for the applicant to appeal from the original denial or appeal and file the common law writ of certiorari.

After certiorari, which is discretionary with the Court, is granted the clerk is to notify the City. There is *no time limit* specified for filing the transcript, but the City shall cause the transcript to be made immediately. After the filing of the

transcript, the cause shall stand for trial at the expiration of ninety (90) days although there is no assurance that the hearing will be scheduled immediately at the end of ninety (90) days.

The result is that it is not from three (3) to five (5) months, but in excess of six (6) months before a new applicant for a license would have a judicial review of his application.

While a license holder may request and in the discretion of the Court obtain a stay from revocation or suspension during judicial review, a new applicant who has never had a permit may not obtain a stay during a judicial review. There is no provision in the ordinance to provide for a temporary permit during the application process or appeal, nor is there any possibilities of a stay since a new applicant would not have been in business prior to his application. The statement by Petitioner in footnote one (1) that these matters are not at issue in this Petition is not correct.

The statement of Petitioners that the Ordinance is nearly identical to that litigated in *FW/PBS, Inc. v. City of Dallas* and amendments made in accordance with that decision is a conclusion made in the Preamble of the Ordinance and not as a result of any facts in the record. Certainly, the City did not review its own Charter or the statutory law of Tennessee since the zoning provision was found in violation of the Charter of the City and statutes of the State.

Additionally, the fact that this Court in *FW/PBS* vacated the decision of the Court of Appeals for the Fifth Circuit as to the disabling features of the Dallas Ordinance eliminated any precedential benefit upon which the City could rely for its Ordinance.

REASONS FOR DENYING THE WRIT

1. THE SIXTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT.

The Sixth Circuit followed the principles first enunciated in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965). This Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), concluded that the third *Freedman* requirement that the censor should initiate judicial action and bear the burden of proof did not apply to a licensing scheme under review. However, under *Freedman*, *FW/PBS* and other decisions of this Court, the Sixth Circuit determined that the City of Memphis Ordinance was plagued by the same indefinite delays that rendered the ordinance in Dallas unconstitutional in *FW/PBS*. Although this Court has not expressly defined prompt judicial review, the Sixth Circuit believed that potential delays for the issuance of a license of over five (5) months are impermissible. Any administrative decisions must be made "within a specified and reasonably brief time period during which the status quo is maintained." 110 S.Ct. at 606.

Respondents assert that the Sixth Circuit overlooked the original thirty (30) day period for issuance of the license, and that it may be at least ninety (90) days or more of administrative delays before Respondents could petition a court for a common law writ of certiorari and in excess of three (3) months not including the time for filing the transcript before a judicial review. The delays doing administrative hearing for a new applicant for a permit and the delays for judicial review clearly violate the principles established by this Court for procedural safeguards necessary for a license for distribution of materials protected by the First Amendment. Petitioners do not have a sufficiently important request upon which this Court should grant certiorari.

2. THERE IS NO IMPORTANT QUESTION RAISED IN THIS CAUSE REQUIRING REVIEW BY THIS COURT OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS.

In applying the principles first established in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965), this Court early on decided it need not determine the only constitutional permissible time limits. The Court stated in *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971), that constitutional permissible time limits may vary in different contexts. In *Thirty-Seven Photographs*, the Court determined that it could construe the federal statute to require forfeiture proceedings be instituted within fourteen (14) days and judicial action to be completed within sixty (60) days. A seventy-four (74) day delay for importers from the beginning of the administrative procedure to the final decision in the district court met the procedural safeguards needed.

On the other hand, the Court in *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423 (1971), could not rewrite the statute which placed the burden of obtaining prompt judicial review on the user rather than the government. In *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 88 S. Ct. 754 (1968), the fifty (50) to fifty-seven (57) day period for obtaining an administrative decision did not amount to a specifically brief period and was impermissible.

In *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239 (1975), this Court held that a delay of more than five (5) months before a hearing on the merits was excessive.

Finally, this Court declared in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), that although the Ordinance provided the Chief of Police shall approve the issuance of the license within thirty (30) days after the receipt, the license may not issue until the premises have been approved by the health department, fire department and building official. Since the

Ordinance did not set a time limit in which the inspections must occur, the Ordinance did not meet the procedural safeguard requirements that the decision to issue the license must be issued in a specified and reasonable brief time period during which the status quo is maintained.

The Sixth Circuit correctly considered the rulings of the Court as to administrative and judicial review and correctly determine that a period of three (3) to five (5) months which in reality is in excess of six (6) months from the time that a new applicant applies to the granting of the license did not meet the test established by *Freedman* and *FW/PBS*.

3. THERE IS NO CONFLICT IN THE CIRCUITS REQUIRING REVIEW.

Petitioners' question for review is limited to providing access to a court as opposed to completion of judicial review without any consideration of the time periods in the administrative licensing phrase and presents no conflict in the circuits.

Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993), did not hold that access to a Court met prompt judicial review. The Transit Authority Regulations were not a licensing system which required a prior restraint review. Persons contacted the Authority by telephone, and requested and received permission to engage in noncommercial expressive activity on a first-come-first-served basis. If persons were denied authorization in one location, they may seek to use a different one or to reserve a different time. Upon this basis, the Court found that the authorization requirement is not open to the kind of arbitrary application that the Supreme Court has determined as inherently inconsistent with a valid time, place, and manner regulation, because such discretion has the potential for becoming a means of suppressing a particular point of view. The Court found it was more appropriate to scrutinize the permit system, as the Supreme Court did in *Heffron v. Int'l Society for*

Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981). This case does not support Petitioners' claim of any conflict between the First Circuit and the decision by the Sixth Circuit in this cause.

Neither does *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), support a conflict. *Graff* is an en banc decision construing an Ordinance governing the right of Mr.Graff to obtain a license to build a structure and operate a newsstand on public property. An operator is given fifteen (15) days to remove after the posting of a removal notice and may appeal within that time. A hearing is scheduled within thirty (30) days, and the newsstand operator has fifteen (15) days after the Commissioner's final decision to appeal to the Courts. Five (5) of the twelve (12) judges determined that the Illinois procedure of review of administrative agency decisions by common law writ of certiorari, which review was extremely broad in scope and extends to all questions of fact and law contained in the record before the Court, met the procedural safeguards required of *Freedman*. The time limit for Mr. Graff would be an administrative hearing within thirty (30) days of his appeal. However, any adverse decision was stayed for fifteen (15) days during which time he could appeal to a state court under the Illinois common law writ of certiorari. None of the procedural provisions are set forth in the case. It may be assumed that Mr. Graff could obtain a stay of the removal during the pendency of judicial proceedings. However, the main opinion of five (5) judges noted that it was an open question whether the procedural protection of *Freedman* were necessary in an Ordinance that regulates the building of newsstands on public property. *Graff* is distinguished in *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland*, 58 F.3d 988 (4th Cir. 1995). In footnote 17 at page 1,000, the Fourth Circuit notes that only five (5) judges join the principal opinion and seven (7) who wrote to concur or dissent all indicated their disagreement that the mere *availability* of judicial review satisfied the prompt judicial review requirement. At least one of the

concurring opinions determined that the Ordinance for occupation of a sidewalk for a newsstand was not the kind of scheme for which the lack of a special provision for prompt judicial review was fatal. Under the circumstances, the Seventh Circuit Opinion in *Graff* is not in conflict.

Not mentioned by the Petitioners is the decision of *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1697. That Court correctly held that the Ordinance under discussion was inadequate under *any* interpretation of prompt judicial review, because it created the risk that expressive activity could be suppressed indefinitely in the administrative phase *prior* to a judicial review of the decision to deny a license.

The Fifth Circuit in *T.K.'s Video, Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994), considered a licensing Ordinance which required the granting of a denial of the license within sixty (60) days. However, the administrative denial by the Director of Public Works is not final for thirty (30) days. The Denton County Ordinance also provided that an applicant with a license which has been suspended or revoked by the Director of Public Works has the revocation or suspension stayed by the filing of appeal which stay last until final decision by the state district court. The Court of Appeals also determined that the *Denton* Ordinance was invalid in failing to maintain the status quo. An applicant previously operating within the county at the time of the adoption of the Ordinance can continue operation during the licensing. However, an applicant for a license who was not in business when the Ordinance was adopted was not free to operate while its license application was pending. Upon the denial of a license, however, the Court determined that access to the Texas court was sufficient since a rejected license applicant has thirty (30) days to seek judicial relief before the order of the Director of Public Works becomes final. There is no discussion of the relief obtainable in the Texas court. The Court does say that it reads the Supreme Court decision in *FW/PBS* that

the state must offer a fair opportunity to complete the administrative process and access the Courts within a brief period, but a brief period in which all judicial avenues are exhausted would be an oxymoron. The Court goes on to state:

> "FW/PBS requires only a prompt judicial hearing, a standard that the order meets by giving an unsuccessful license applicant thirty days to appeal to a district court in Denton County 'on a trial de novo basis.' The availability of expeditious judicial review obviates the need for an automatic stay. *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205 (1977).

24 F.3d at 709.

National Socialist Party held that in the absence of expeditious judicial review, an automatic stay must be granted. It is evident that the Fifth Circuit thought that the access to Court available during this thirty (30) day period before denial of the license was such that it provided the expeditious judicial review because of remedies available in the state court. Subsequently, in *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068 (5th Cir. 1994), the Ordinance in *Amarillo* required a licensing decision within eleven (11) days or within three (3) days a reinspection and issuance of license within one (1) day of correction which met the specified and brief requirement for administrative proceedings. Again, the Fifth Circuit denied a mandatory stay should be available and stated the availability of expeditious judicial review and the possibility of a temporary restraining order obviate the need for an automatic stay. *National Socialist Party, supra.* The Court noted that a *denied applicant for a license* can immediately challenge the regulatory decision in Court and request a temporary restraining order to prevent *closing* a business. It notes that in June 1991, which is shortly after the *FW/PBS* decision, the Texas legislature amended the Texas local government code to give district courts jurisdiction for appeals from licensing decisions affecting adult busi-

nesses. Under these circumstances, the judicial procedures in Texas appear to be such that even a *denied applicant* for a license can request a temporary restraining order under the Texas law to prevent closing a business. The minimum administrative periods in both of these ordinances present no conflicts within the circuits requiring this Court to grant the Petitioners' writ of certiorari.

Finally, the Petitioners cite two cases recently decided in the Fourth Circuit of *11126 Baltimore Blvd., Inc. v. Prince George's County Maryland*, 58 F.3d 988 and *Chesapeake B & M, Inc. v. Harford County Maryland*, 58 F.3d 1005 (4th Cir. 1995). In *Harford*, the administrative proceeding for the granting of a license was supposedly forty-four (44) days. However, there was no assurance (similar to *FW/PBS*) that the health department or other agencies required to inspect would report back to the licensing department within thirty (30) days so that the District Court found that the licensing law proceedings indefinite. The District Court held the licensing law was unconstitutional because it did not ensure a reasonably prompt administrative decision and fails to preserve the status quo for existing book stores during the application process. The county did not cross appeal these rulings. The District Court, however, had determined that it was possible that the administrative rulings might be applied constitutionally, and the book store appealed. The Fourth Circuit determined that the licensing decision was unenforceable because it does not ensure a prompt administrative decision and it must vacate the District Court's order to the contrary. *See* 58 F.3d at 1011. However, the Fourth Circuit determined that it would still rule as to whether the county had provided for prompt judicial review and they did so consistent with the Supreme Court licensing cases in which the Court reviewed the adequacy of each procedural safeguard. It concurred with its decision in *11126 Baltimore Blvd., supra*, that prompt judicial review means a sufficiently prompt decision on the merits.

In *11126 Baltimore Blvd., supra*, the special permit provisions of the zoning law were considered to be enough of a licensing scheme as to require a review according to the standards of *Freedman*. The Court of Appeals held that it was unable to conclude that one hundred fifty (150) days was a reasonably brief time frame in which to render an administrative decision on the zoning. The Court found the administrative delay violated procedural safeguards. The Court observed that Justice O'Connor in her plurality opinion did not amend the principles in *Freedman* for a final judicial determination on the merits. Even with a local court rule, the parties did not dispute there would be one hundred three (103) days typically to obtain a judicial ruling after the denial of an application for a general zoning exception. A delay in excess of three (3) months following a one hundred fifty (150) day administrative delay did not ensure a prompt judicial review.

Since this Court recognizes that constitutionally permissible time limits may vary in different contexts, there is no substantial conflict in the circuits, nor does this case present one in which this Court should grant review.

4. ADMINISTRATIVE DELAY INVALIDATES ORDINANCE.

The minimum of ninety (90) days in the Ordinance for application for a license and an appeal is such that this is an unreasonable time period in which to issue a license. The Court need not reach any decision on interpretation of judicial review since it is able to decide the case on another ground of the unreasonable administrative period. While respondents do not agree there is a conflict, the Court should not have to reach the question of the judicial review in that the administrative procedure is so long. Whether or not there is a conflict is irrelevant to the ultimate outcome of the case before the Court because resolving the conflict will not change the result which should be reached because of the unreasonable administrative delay.

Additionally, the review by common law writ of certiorari as discussed herein is discretionary, so that whether or not there is any conflict between access to the court or judicial review on the merits, the point would not be reached because access to the courts in Tennessee are not guaranteed since a common law writ of certiorari is a discretionary remedy.

5. COMMON LAW CERTIORARI IS NEITHER PROMPT NOR MEANINGFUL JUDICIAL REVIEW, NOR GUARANTEED ACCESS TO THE COURTS.

The common law writ of certiorari in Tennessee is discretionary. *Clark v. Metro Government of Nashville*, 827 S.W.2d 312 (1992), discusses common law certiorari as follows:

> The remedy of certiorari is not available as of right, but is granted under unusual or extraordinary circumstances. It is instituted by an application to a court of competent jurisdiction which may or may not authorize the writ.

827 S.W.2d 316-317.

This is not a recent holding in the State of Tennessee. *Uselton v. Price*, 41 Tenn. App. 134, 292 S.W.2d 788 (1953) cites *State, ex rel. Karr v. Taxing Dist. of Shelby Co.*, 84 Tenn. 240 (1886), wherein it is said that certiorari to review proceedings of inferior tribunals is not a writ of right, but is issued in the sound discretion of the Court. *Boyce v. Williams*, 215 Tenn. 707, 389 S.W.2d 272 (1965), was a holding by the Supreme Court that whether common law writ of certiorari will issue is a matter of discretion. *See also, Hewgley v. Trice*, 207 Tenn. 466, 340 S.W.2d 918 (1960). *Boyce* also recognizes the distinction between statutory and common law writ of certiorari in that an administrative act or function is reviewable by the common law writ of certiorari and not by the statutory writ.

The procedures for review by a Court under both common law or statutory writs of certiorari are as set forth in T.C.A. § 29-9-

101, *et seq.*, and a portion is copied in Appendix A. The same procedure for review is used under both kinds of writs. *Fairhaven Corp. v. Tenn. Health Facilities Comm'n*, 566 S.W.2d 885 (1976). However, so much of the statute has prescribed a de novo hearing apply exclusively to the statutory writ of certiorari. *Fentress County Beer Board v. Cravens*, 356 S.W.2d 260 (Tenn. 1962), and *Hoover Motor Express Co. v. R. R. and Public Util. Comm'n*, 195 Tenn. 593, 261 S.W.2d 233 (1953). As discussed in the facts, it would be substantially in excess of ninety (90) days after the filing of a writ of certiorari that the writ would be set for trial if the Court in its discretion granted the writ of certiorari.

The Court review in a common law certiorari is limited to the record to determine as a question of law whether there is any material evidence to support the agency or administrative officer's finding. *Cooper v. Williamson County Board of Educ.*, 746 S.W.2d 176 (Tenn. 1987). While we have spoken of a new applicant for a license, the Memphis Ordinance does not stay a suspension or revocation during a judicial hearing unless the Court would order a writ of supersedeas. Again, this is in the discretion of the Court so that the status quo is not maintained. T.C.A. § 27-9-106. *Hoover Motor Express* is the seminal case in Tennessee on common law writ of certiorari and states:

> Under the common law writ of certiorari, questions of law only will be reviewed by the courts.

261 S.W.2d at 238.

There is not only lack of access to the court since the writ is discretionary, nor a prompt judicial decision, but also the lack of a meaningful full-bodied, genuine and guaranteed judicial review. Review is limited to whether or not in the administrative proceedings, the administrative officer exercising his function exceeded his jurisdiction or acted fraudulently, illegally or arbitrarily.

6. THE PETITION HAS NUMEROUS MISSTATEMENTS OF LAW AND FACT.

The Petition incorrectly states that the administrative ruling is stayed pending a judicial determination. *See* page 4 at Footnote 2. The City incorrectly cites T.C.A. §27-8-112 that supersedeas shall issue to stay any suspension, revocation or denial of a permit. The correct statute on supersedeas on a common law writ of certiorari is T.C.A. § 27-9-106 as cited in Appendix A in which supersedeas is discretionary.

Furthermore, there could not be an automatic stay which would allow a new applicant to have a temporary license. The decision of the Sixth Circuit holds a stay is not possible to permit a new applicant to engage in the business while the license application is on judicial review. The rule is the same in Tennessee. If a new application for a license is denied, a writ of supersedeas does not give a temporary permit. *Watkins v. Naifeh*, 635 S.W.2d 104 (1982). The statement in note 2 that an applicant may obtain a stay during judicial review is in error. The correct fact is that a licensee whose license has been revoked or suspended may (which is discretionary) obtain a stay during judicial review by seeking the writ of supersedeas.

The assertion in footnote 3 on page 8 that the Sixth Circuit recognized that the writ of certiorari is the proper method of review is in error. *Louisville and N.R.R. v. Public Service Comm'n*, 631 F.2d 436 (6th Cir. 1980), recognized that prior to the enactment of the Uniform Administrative Procedures Act in Tennessee in 1974, review by taxpayer of the State Board of Equalization's action was obtained through the common law writ of certiorari. Since this had been changed in 1974, common law writ of certiorari was not the proper method of review at the time of this case. Its hold is that a federal court action against enforcement of tax assessment was not barred by the Anti-Injunction Act.

It is further a misstatement of law to cite the 1902 Tennessee case of *Tennessee Cent. R.R., Co. v. Campbell*, 75 S.W. 1012 (Tenn. 1902), that certiorari is one of the most efficient remedies provided. This quotation applied to certiorari proceeding from a lower court to a higher court and has now been superseded by Rule 10 of the Tennessee Rules of Appellate Procedure which is attached in Appendix A. The comment clearly states that the rule abandons the old terminology associated with the writ system of interlocutory review.

It is also incorrect for the City to assert that as to administrative review, the Sixth Circuit panel left the district court ruling undisturbed (Petition, page 10). This is not so in that the Sixth Circuit considered the time for the administrative hearing, plus the delay for a judicial review to determine that there was no prompt judicial review provided by the Memphis Ordinance. It is further wrong to imply that the City of Memphis has no authority to dictate procedure to a state court. The assertion that the ruling of the Sixth Circuit handcuffs the City and all other municipalities from licensing adult facilities is specious.

Any municipal attorney should advise the Court that a municipal corporation is a creature of law established for special purposes and its acts, must be authorized by its Charter or other laws, which is commonly referred to as "Dillon's Rule." *See McQuillin Municipal Corporation § 10.09, 3d ed. City of Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988), holds that in the almost two hundred (200) years of this state's existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved. Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the legislature in their Charters or under statutes. There are numerous state statutes which are applicable to municipalities or counties which place certain duties on the courts. For example, there is a special state statute for the control and licensing of beer in Tennessee

which provides for the procedures to be used including judicial review. Additionally, Tennessee adopted a statutory procedure for injunctions against films and magazines following the model of *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325 (1957), when it adopted T.C.A. § 39-17-905 in 1965 that a person is entitled to a trial on the issues within two (2) days after the answer and a decision rendered by the court within two (2) days of the conclusion of the trial.

It is certainly a misstatement that permits for parades and other first amendment activities are heard only by writ of certiorari to state court and have less rights than adult entertainment. As early as this Court's decision in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969), the Court recognized for parade permits and other fundamental freedoms not only were objective standards to be applied, but the procedural standards of *Freedman* applicable. Justice Harlan noted in concurring that although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his permit application, that state court was not obligated to render decision within any fixed period of time. The opinion of Justice Stewart noted the assumption that the Ordinance as then construed by the Alabama Supreme Court was constitutional would depend upon, among other things, the availability of expeditious judicial review.

The assertion that law licenses, medical licenses or others are reviewed by the common law of certiorari is not correct. Since 1974 the State of Tennessee adopted the Uniform Administrative Procedures Act by which review of administrative determination is prescribed for all state boards and commissions and any other units of state government. *See* T.C.A. § 4-5-101, *et seq.* Common law certiorari is not the method used.

Finally, the Petition (page 14), asserts a delay of three (3) months inures to the permit holders benefit. This has no application to a new applicant for a license who has nothing to

stay and is kept out of business, not only the three (3) to five (5) months minimum which the Court of Appeals holds, but probably in excess of six (6) months by counting the original thirty (30) days for license application and the time to prepare and file a transcript.

7. REQUIRING ALL SHAREHOLDERS TO PROVIDE DISCLOSURE AND OBTAIN LICENSE FOR CORPORATE ADULT BUSINESS VIOLATES FIRST AMENDMENT.

The Ordinance does not just require minimum disclosure of certain information as the question presented implies. Licenses are to be issued in the names of natural persons only. License applications by corporations require each individual who has an interest in the business to apply. Each person must be qualified for a license. (Ordinance, § 122(a)(5)(7).) The Sixth Circuit followed many other decisions, but cited only two that the requirement that every person with any ownership interest, regardless of how small, sign the license application, is impermissibly broad. Even an argument of accountability is of no significance because officers and directors, not shareholders are legally responsible for the management of a corporation's business. If the corporation does not comply with the licensing privilege, the City of Memphis would be free to take appropriate enforcement action against the corporation, its officers and directors. *See Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989).

There are a series of decisions both appellate and district courts, upholding this principle. The District Court opinion of Judge Gibbons cited no authority and did not distinguish the contrary authorities. *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), correctly determined that providing a disclosure of any shareholder holding more than 10% was not pertinent to enforcement of the ordinance. There could be no purpose other than harassment in requiring individual stockholders to file

separate applications under oath. *T.K.'s Video, Inc. v. Denton Co., Tex.*, 24 F.3d 705 (5th Cir. 1994), affirmed the district court, which eliminated licensing requirements for stockholders, limited partners, and equity holders. District court authorities recognized that an application by shareholders or anyone interested directly in the ownership impinged on First Amendment Rights and information from stockholders was in no way related to the purpose of the ordinances or regulations. *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553 (M.D. Tenn. 1989); *Penco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978); *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979). All of these decisions recognize that officers and directors are legally responsible for the management of a corporation's business. Many reason that a compelled content-neutral disclosure of owner information can chill protected expression citing *Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). This Court recently reaffirmed in *McIntyre v. Ohio Elections Comm'n*, ____ U.S. ____, 115 S. Ct. 1511 (1995), that freedom under the First Amendment to publish anonymously extends beyond literary realm to advocacy of political causes. That decision emphasized that disclosure must further a substantial government interest.

Shareholder disclosure was not an issue either in the District Court or Court of Appeals in *Dumus v. City of Dallas*, 648 F.Supp. 1078 (N.D. Tex. 1986), and *FW/PBS Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). The ordinance provisions in Dallas were different from the City of Memphis and only required each individual who had a twenty percent (20%) or greater interest in the business to sign the application for a license. When individual shareholders disclosure was an issue, the Fifth Circuit decided in *T.K.'s Video Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994), that shareholder license requirements were invalid as not related to the purpose of the ordinance.

The City of Memphis should license the corporation rather than harassing stockholders to file separate applications under oath. A truly content-neutral licensing ordinance with narrowly tailored provisions does not need the names of each and every shareholder. The Sixth Circuit in dicta says the city "perhaps" may have an interest identifying those who have a controlling or significant share in such a business. However any future regulation would have to relate to a substantial government interest which we believe would be satisfied by identification of corporate officers.

Although Petitioner asserts that the ruling on shareholder disclosure is inconsistent with the case law of this Court, it cites no decision of this Court to the contrary nor do any of the federal courts of appeal or federal district courts cite any when they invalidate shareholder disclosure. Even the reference by the City of Memphis to Professor Gerard cites no cases of this Court, and states the Supreme Court has never ruled on the constitutionality of licensing scheme that impose personal qualifications on owners or employees of adult businesses.

There is no legitimate governmental interest in requiring stockholders, minority or otherwise, that own, but may or may not actually operate, an adult business to submit information to the Director of Police and be qualified for a license. The Sixth Circuit was correct in finding the provision in the Ordinance requiring each shareholder with any ownership interest to sign the application and meet all license requirements is impermissibly broad. In addition, said requirement serves no legitimate government interest nor is it narrowly tailored to further any legitimate government interest and is not a sufficient ground to warrant the grant of certiorari.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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